No. 1183

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Supreme Court of the United States

OCTOBER TERM, 1944

ANNIE NORTON, TRUSTEE,
Petitioner and Appellant Below,

v.

TOM GREEN COUNTY, TEXAS,
Respondent and Appellee Below.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF TEXAS, THIRD SUPREME JUDICIAL DISTRICT.

REPLY BRIEF FOR RESPONDENT

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REPLY BRIEF FOR RESPONDENT

Opinion Of The Court Below.

The opinion of the Court of Civil Appeals (R. 106) is reported in 182 S.W.2d 849, *et sequente.*

Jurisdiction.

Petitioner attempts to invoke the jurisdiction of this court under Section 344(b), Title 28, U. S. C.,

upon the grounds that respondent's act in calling petitioner's bonds for redemption (a) impairs the obligation of a pre-existing contract and (b) deprives petitioner of her property without due process of law. Respondent says that, under its previous decisions, this court has no jurisdiction to review the judgment of the State court for the reasons which follow:

1. The State court has not given effect to a legislative act whch was enacted subsequent to the creation of the contract and no Federal question is presented under the "contract clause" of Article I, Section 10 of the United States Constitution. *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 30, 31 L. Ed. 607, 612; *Bacon v. Texas,* 163 U. S. 207, 216, 41 L. Ed. 132, 136; *Tidal Oil Co. v. Flanagan,* 263 U. S. 444, 68 L. Ed. 382, 386. The only legislative Act which was considered by the State court was Article 720, R. C. S. 1925, which was in effect at the time the bonds were issued.
2. The order of the Commissioners' Court of Tom Green County (R. 25) exercising the option to redeem the courthouse bonds was not a legislative Act. It does not purport to endow the county with new powers or authority which would be characteristic of a legislative Act but by its express terms it exercises "the option granted by Article 720, Revised Civil Statutes of Texas, 1925, to redeem all bonds of the above described issue now outstanding" (R. 26, 27), which is nothing more than a ministerial act

executing the provisions of the pre-existing Article 720. It does not grant a new right to respondent but exercises an existing one. It does not bear the marks of a legislative Act nor does the Commissioners' Court possess, or claim to possess, legislative power to enact a new law relating to the subject matter.

3. No impairment is shown nor has petitioner been deprived of her property. If petitioner's erroneous construction of Article 720 is accepted for the purpose of this argument, the order calling the bonds for redemption and giving notice that interest will not be paid on the bonds after the date of call, is, at most, a *breach* of contract or, more properly, evidence of an intention to breach the contract in the future. The breach of a contract presents no Federal question under either the contract clause or the due process clause. *McCormick v. Oklahoma City,* 236 U. S. 657, 59 L. Ed. 771; *St. Paul Gaslight Co. v. St. Paul,* 181 U. S. 142, 45 L. Ed. 788; *Manila Inv. Co. v. Trammell,* 239 U. S. 31, 32, 60 L. Ed. 129, 130. Petitioner's only injury, if any, resulting from the Commissioners' Court order of which she complains, is that future interest will not be paid on her bonds. If the order is void, as she contends, she may have her day in court when the interest is not paid when allegedly due; if valid, she has not been injured.

4. The order complained of does not "coerce" petitioner to sell her bonds to B. V. Christie & Com-

pany. By its terms, she may keep her bonds or present them for redemption as she chooses. If the Commissioners' Court had no authority to call the bonds for redemption, its efforts to do so are futile and petitioner may proceed in court to collect her interest when due. If that body had such authority, interest stopped on the day of call and petitioner may present her bonds now and collect the principal and accrued interest to October 10, 1943, which is all she is entitled to receive under the bond contract. The petition alleges neither a deprivation of property nor lack of due process of law.

This case is similar to that *Catholic Order of Foresters v. State,* 271 N. W. 670 (N. D. Sup. Ct.) in which this court denied the petition for writ of certiorari (301 U. S. 665, 81 L. Ed. 1331).

Statement of the Case.

Respondent notes the following inaccuracies in petitioner's statement of the case:

1. The statement that "the decision of the Texas court will cause losses amounting to many millions of dollars to holders of Texas County bonds residing throughout the United States" (Petition 2). There is no evidence in the record to sustain this statement and no "loss" to a bondholder is caused by the exercise of an option of redemption which was a part of the contract represented by the bonds at the time of their issuance.

2. The statement that "neither the bonds nor the proceedings authorizing their issuance provided that the bonds would be redeemable prior to maturity" (Petition 2). Article 720, Revised Civil Statutes of Texas, 1925, which was written into and became a part of the bonds and the proceedings authorizing their issuance, specifically provided for the right of redemption before maturity. All persons were charged with knowledge of the provisions of this statute.

3. The statement that "They (petitioner's bonds) were to be purchased by Christie, with Christie's money . . . . " (Petition 3). Christie did not agree to purchase petitioner's bonds but his contract with Tom Green County (R. 8 - Ex. C) gave him an option to purchase the refunding bonds which the county proposed to issue for the purpose of refunding, cancelling and in lieu of the original bonds which were to be redeemed. (R. 10.) This contract provided that "upon exercising our (Christie's) option of (to) purchase *the refunding bonds,* we agree to make available a sum equal to the principal amount of the bonds surrendered for exchange and the County agrees to make available sufficient funds to pay the accrued interest on such bonds to the date of exchange. The *refunding bonds* shall be delivered to us . . . . " (R. 10).

SUMMARY OF ARGUMENT

Counter Point A.

Petitioner's bonds were redeemable by the county under the provisions of Article 720, Revised Civil Statutes of

Texas, 1925, which was in effect when the bonds were issued and was written into and became a part of the bonds by operation of law. Petitioner was charged with knowledge of this statutory option when she purchased her bonds and the exercise of the option constitutes an enforcement of the contract—not an impairment of its obligation. (In answer to Petitioner's Point A.)

Counter Point A(1).

The order passed by the governing body of Respondent County exercising the option to redeem the bonds was a ministerial, and not a legislative, act. (In further answer to Petitioner's Point A.)

Counter Point B.

The method followed by Respondent County in redeeming and refunding its courthouse bonds is a valid and customary exercise of Respondent's right of redemption and does not deprive Petitioner of her bonds without due process of law nor does it coerce Petitioner to sell her bonds to B. V. Christie & Company.

Argument.

The Commissioners' Court of Tom Green County was without authority in June and July, 1927, when these bonds were issued, to issue courthouse bonds which were *non*-redeemable prior to maturity.

A county does not have inherent power to issue bonds but such power, if it exists, must be derived from appropriate constitutional or statutory authority. Where such power is granted and the legislature

prescribes the type and character of bonds to be issued, the governing body is powerless to issue bonds of a different type or character. *Robertson v. Breedlove,* 61 Tex. 316; *Ball v. Presidio County,* 88 Tex. 60, 29 S. W. 1042; *Lasater v. Lopez,* 110 Tex. 179, 217 S. W. 373; *Anthony v. Jasper County,* 101 U. S. 693, 25 L. Ed. 1005; *Ogden v. Daviess County,* 102 U. S. 623, 26 L. Ed. 263; *Barnam v. Town of Okolona,* 148 U. S. 393, 37 L. Ed. 495.

The statutes authorizing the issuance of bonds enter into and become a part of the bond contract as fully as if copied verbatim on the face of each bond and all persons are charged with knowledge thereof. *Cochran County v. Mann,* 141 Tex. 398, 172 S. W. (2) 689, 690; *Wood v. Lovett,* 313 U. S. 362, 85 L. Ed. 1404; *Home B. & L. Ass'n. v. Blaisdell,* 290 U. S. 398, 429, 78 L. Ed. 413, 423; *Anthony v. Jasper County,* 101 U. S. 693, 697, 25 L. Ed. 1005, 1008.

Petitioner's bonds recite upon their face that they were issued under Articles 701 to 725, inclusive, Revised Civil Statutes, 1925, (R. 11). Article 720 of this group of statutes reads as follows:

> "All bonds issued under this chapter shall run not exceeding forty years, and may be redeemable at the pleasure of the county at any time after five years after the issuance of the bonds, or after any period not exceeding ten years, which may be fixed by the commissioners court. Acts 1893, p. 1112; G. L. vol. 10, p. 542."

This statute was in effect when the bonds were issued and became a part of the bond contract. The

Supreme Court of Texas in *Dallas County v. Lockhart*, 96 S. W.2d. 60, 128 Tex. 50, (1936) held that, as to bonds issued under this statute, "the right of the county to redeem them is expressly reserved and conferred" by the statute. (p. 61). The court further held that the right of redemption might be exercised for the purpose of refunding the bonds at a lower rate of interest or, if funds sufficient to discharge them were available, the option might be exercised to retire the debt. The court said (p. 63): "The valuable right of redemption by refunding *conferred upon the county by the Legislature* is not subject to be defeated by the will of a bondholder."

In *Cochran County v. Mann*, 141 Tex. 398, 172 S. W.2d 689 (1943), the Supreme Court of Texas had before it the same basic question which is presented in this case, viz, whether bonds issued under Article 720 were redeemable perforce of the statute. The court said (p. 691):

> "As we construe the above statute, where bonds are issued under the chapter therein referred to, if the Commissioners' Court at the time the bonds are issued makes no provision concerning its right to redeem the bonds prior to their maturity, they may be redeemed at the pleasure of the county at any time after five years after the issuance thereof. However, the Commissioners' Court may, by an appropriate order entered at the time the bonds are issued, postpone the date after which the bonds may be redeemed to not exceeding ten years from the date of their issuance. The bonds are redeemable, in all events, at not exceeding ten years from the date of their

issuance. Dallas County v. Lockhart, State Treasurer, 128 Tex. 50, 96 S. W.2d 60."

This construction was affirmed in *Bexar County v. Sellers,* 142 Tex. 290, 178 S. W.2d 505 and again in *Jefferson County v. Sellers,* 142 Tex. 528, 180 S. W.2d 138 (four cases).

When respondent called its bonds for redemption, therefore, it was exercising an option which was a part of the bond contract from its inception. This was a ministerial, not a legislative, act. Petitioner knew, or was charged with knowing, that the bonds were redeemable by the county when she bought them. The exercise of the redemption privilege is an enforcement of the contract—not an impairment of its obligation.

The courts have given effect to similar statutory options fixed by the laws of other states. *Catholic Order of Foresters v. State,* 271 N. W. 670 (N. D. Sup. Ct.—Certiorari denied—301 U. S. 665, 81 L. Ed. 1331); *Dupont v. Mills,* 196 Atl. 168 (Del. Supt. Ct.); *Maricopa County v. Osborne,* 125 Pac.2d 703, 136 Pac.2d 270, (Ariz. Sup. Ct.); *Roberts & Co. v. Paducah,* 95 Fed. 62; *National Bank v. St. Joseph,* 31 Fed. 216; *Harmon County v. Edwards,* 282 Pac. 1090 (Okla. Sup. Ct.); *Neighbors of Woodcraft v. Rupert,* 4 Pac.2d 360 (Idaho Sup. Ct.); *Carlson v. Helena,* 102 Pac. 39 (Mont. Sup. Ct.).

Petitioner complains that the order of the Commissioners' Court of Tom Green County calling the bonds for redemption has the effect of forcing petitioner

to sell her bonds to B. V. Christie & Company. We confess that we are not clear as to petitioner's line of reasoning on this point but it appears that it would be applicable alike to bonds which are made optional by express language appearing on the face of the bonds as well as those which are made optional by the statute. The plan followed by respondent in contracting for the sale of its refunding bonds bearing a lower rate of interest and requiring the purchaser to provide the funds necessary to take up the bonds called for redemption, is a common practice made necessary by the laws of Texas relating to refunding and is universally and frequently practiced.

Articles 713 and 714, Revised Civil Statutes, 1925, provide that no refunding bonds shall be registered by the Comptroller of Public Acounts until the original bonds are presented for cancellation. When bonds are called for redemption, whether under a statutory or contractual option, it becomes necessary for the bonds to be taken up at the place where they are made payable and held until they can be presented to the Comptroller for cancellation, if it intended to refund them. In such cases, it is customary and necessary for the county or municipality to make arrangements with the purchasers of the refunding bonds to provide funds with which to take up the outstanding bonds which have been called for payment. A priori, the bonds must be taken up with funds belonging to third persons because (a) if the county used its own funds the debt would be merged in the debtor and discharged and there would be nothing to refund, and (b), if the

county or municipality had sufficient funds to retire the bonds, there would be no necessity to refund them.

The contract in *Dallas County v. Lockhart,* supra, was substantially identical with the contract in the case at bar. Of the former, the Texas Supreme Court said (p. 62): "'The transactions contemplated by the contract between the county and Donald O'Neil & Company are those of a commonly employed refunding operation. They come squarely within the terms of the statutes. In entering into that contract, the county was but exercising its statutory right to issue new bonds in lieu of the originals and bearing lower interest rates."

Further, as shown in our statement of the case, supra, respondent's contract with B. V. Christie & Company gave Christie an option (which was later exercised) to purchase the refunding bonds, not the original bonds, and petitioner is not obligated to sell her bonds to Christie or, for that matter, to the county. In exercising the option to redeem, the county merely accelerated the maturity of the bonds and relieved itself of the obligation to pay the higher rate of interest after the date of call. Petitioner is entitled to receive the principal of her bonds and interest accrued to the date fixed for redemption and, under the contract, that is all she was ever entitled to receive.

The use of Christie's funds to take up the called bonds is but a step toward the final purpose—the refunding of the bonds at a lower interest rate. In making such funds available, he is, in effect, making

payment on the refunding bonds which he has contracted to purchase. The contract at all times binds the parties to pursue the transaction to its ultimate and intended conclusion. Petitioner, however, has no interest or rights in the matter beyond the point where she receives the principal and accrued interest on her bonds. With that done, her contract has been fully satisfied.

Conclusion.

The petition for writ of certiorari should be dismissed or, in the alternative, denied.

Respectfully submitted,

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